

HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE POKÉMON COMPANY
INTERNATIONAL, INC.,

Plaintiff,

v.

MARCUS FRASIER,

Defendant.

Case No.: 2:14-cv-112
ANSWER AND AFFIRMATIVE
DEFENSES

Defendant Marcus Frasier (“Defendant”), by his attorneys, for his Answer to the Complaint (“Complaint”) of Plaintiff The Pokémon Company International, Inc. (“Plaintiff”) answers as follows:

1. Denies truth of the allegations contained in paragraph 1 of the Complaint, except admits that Plaintiff filed the Complaint in the instant action and otherwise refers to the Complaint as the best evidence of the claims stated by Plaintiff therein.

THE PARTIES

2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint.

1 3. Denies knowledge and information sufficient to form a belief as to the truth of the
2 allegations contained in paragraph 3 of the Complaint, except admits that Defendant resides in
3 Pennsylvania, that he developed, owns and operates the Pokellektor Application (the “App”) and
4 the Pokellektor website located at www.pokellektor.com (the “Website”).

5 **JURISDICTION AND VENUE**

6 4. Denies knowledge and information sufficient to form a belief as to the truth of the
7 allegations contained in paragraph 4 of the Complaint and otherwise states that paragraph 4
8 contains legal conclusions to which no response is required.
9

10 5. Denies knowledge and information sufficient to form a belief as to the truth of the
11 allegations contained in paragraph 5 of the Complaint, except denies the truth of the allegation
12 that Defendant has willfully infringed Plaintiff’s copyrights, and otherwise states that paragraph
13 5 contains legal conclusions to which no response is required.

14 6. Denies knowledge and information sufficient to form a belief as to the truth of the
15 allegations contained in paragraph 6 of the Complaint and otherwise states that paragraph 6
16 contains legal conclusions to which no response is required.
17

18 **FACTUAL ALLEGATIONS**

19 7. Denies knowledge and information sufficient to form a belief as to the truth of the
20 allegations contained in paragraph 7 of the Complaint.

21 8. Denies knowledge and information sufficient to form a belief as to the truth of the
22 allegations contained in paragraph 8 of the Complaint.

23 9. Denies knowledge and information sufficient to form a belief as to the truth of the
24 allegations contained in paragraph 9 of the Complaint.
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1 10. Denies knowledge and information sufficient to form a belief as to the truth of the
2 allegations contained in paragraph 10 of the Complaint, except admit that the Pokémon Trading
3 Card Game can be played as a physical card game or online.

4 11. Denies knowledge and information sufficient to form a belief as to the truth of the
5 allegations contained in paragraph 11 of the Complaint.

6 12. Denies knowledge and information sufficient to form a belief as to the truth of the
7 allegations contained in paragraph 12 of the Complaint.

8 13. Denies knowledge and information sufficient to form a belief as to the truth of the
9 allegations contained in paragraph 13 of the Complaint.

10 14. Denies knowledge and information sufficient to form a belief as to the truth of the
11 allegations contained in paragraph 14 of the Complaint.

12 15. Denies knowledge and information sufficient to form a belief as to the truth of the
13 allegations contained in paragraph 15 of the Complaint.

14 16. Denies knowledge and information sufficient to form a belief as to the truth of the
15 allegations contained in paragraph 16 of the Complaint and otherwise states that paragraph 16
16 contains legal conclusions to which no response is required.

17 17. Denies knowledge and information sufficient to form a belief as to the truth of the
18 allegations contained in paragraph 17 of the Complaint, and refers the Court to the Pokémon
19 homepage, the Trading Card Game Database homepage, the Pokémon Trading Card Game
20 Online page, and every other page on the Pokémon web site as the best evidence of the
21 placement and/or existence of links or other designations thereon.
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1 18. Denies knowledge and information sufficient to form a belief as to the truth of the
2 allegations contained in paragraph 18 of the Complaint, and refers the Court to Pokémon's
3 Terms of Use as the best evidence of the terms stated therein.

4 19. Denies knowledge and information sufficient to form a belief as to the truth of the
5 allegations contained in paragraph 19 of the Complaint, and refers the Court to Pokémon's
6 Terms of Use as the best evidence of the terms stated therein.

7 20. Denies knowledge and information sufficient to form a belief as to the truth of the
8 allegations contained in paragraph 20 of the Complaint, and refers the Court to Pokémon's
9 Terms of Use as the best evidence of the terms stated therein.
10

11 21. Denies knowledge and information sufficient to form a belief as to the truth of the
12 allegations contained in paragraph 21 of the Complaint, and refers the Court to Pokémon's
13 Terms of Use as the best evidence of the terms stated therein.

14 22. Denies the truth of the allegations contained in paragraph 22 of the Complaint, except
15 admits that Defendant is the CEO of Idle Media Inc., which is an online media and entertainment
16 company. Defendant further admits the DatPiff.com website contains its own Terms of Use and
17 avers that the Terms of Use speaks for itself and refers the Court to said terms of use as the best
18 evidence of their contents, however irrelevant to this dispute they may be.
19

20 23. Denies the truth of the allegations contained in paragraph 23 of the Complaint including
21 denying the implication that DatPiff is "his online music business", except admits that Defendant
22 operates the Pokollector Application (the "App") and admits that the App is available for
23 download the Apple App Store and Google Play.
24

25 24. Denies the truth of the allegations contained in paragraph 24 of the Complaint and
26 otherwise states that paragraph 24 contains legal conclusions to which no response is required,

1 except admits that after an individual downloads and opens the App, the title of the App appears
2 on the user's smartphone or tablet.

3 25. Denies knowledge and information sufficient to form a belief as to the truth of the
4 allegations contained in paragraph 25 of the Complaint, except admits that the Pokollector App
5 provides its users with an interactive database that includes information about various Pokémon
6 card series.

7 26. Denies knowledge and information sufficient to form a belief as to the truth of the
8 allegations contained in paragraph 26 of the Complaint, except admits that the Pokollector App
9 provides its users with an interactive database that includes information about various Pokémon
10 card series and various expansion sets of cards.

12 27. Denies the truth of the allegations contained in paragraph 27 of the Complaint.

13 28. Denies knowledge and information sufficient to form a belief as to the truth of the
14 allegations contained in paragraph 28 of the Complaint, except admits that the Pokollector App
15 provides its users with an interactive database that includes information about various Pokémon
16 card series, various expansion sets of cards and various cards, and admits that when a user clicks
17 on a set title he or she can see a listing of card character names within a particular set.

19 29. Denies knowledge and information sufficient to form a belief as to the truth of the
20 allegations contained in paragraph 29 of the Complaint, except admits that the Pokollector App
21 provides its users with an interactive database that includes information about various Pokémon
22 card series, various expansion sets of cards and various cards, and that the App displays images
23 of certain cards.
24

1 30. Denies the truth of the allegations contained in paragraph 30 of the Complaint, except
2 admits that some cards contain a watermark of the Pokollector logo, and refers the Court to the
3 App and Website as the best evidence of same.

4 31. Denies the truth of the allegations contained in paragraph 31 of the Complaint, except
5 admits that the App contains banner advertisements.

6 32. Denies the truth of the allegations contained in paragraph 32 of the Complaint, except
7 admits that in instances where no images of a card are available, a different screen appears that
8 states "We don't have a scan for this card . . . perhaps you'd like to submit one?".
9

10 33. Denies knowledge and information sufficient to form a belief as to the truth of the
11 allegations contained in paragraph 33 of the Complaint, except admits that Defendant owns and
12 operates the Website and that the Pokollector Website was not available to the public as of
13 November 20, 2013.

14 34. Denies knowledge and information sufficient to form a belief as to the truth of the
15 allegations contained in paragraph 34 of the Complaint, except admits that the Pokollector
16 Website is currently available to the public.
17

18 35. Denies knowledge and information sufficient to form a belief as to the truth of the
19 allegations contained in paragraph 35 of the Complaint, including the accuracy of Plaintiff's
20 characterization of the Pokollector Website and App, except admits that the Pokollector Website
21 provides an interactive database that includes information about the Pokémon series and various
22 expansion sets of cards, and that the Pokollector Website displays small images of some cards,
23 and otherwise refers the Court to the Pokollector Website for the best evidence of its
24 functionality, as well as the images and text thereon.
25
26

1 36. Denies the truth of the allegations contained in paragraph 36 of the Complaint, except
2 admits that Defendant has scanned certain cards and uploaded them.

3 37. Denies knowledge and information sufficient to form a belief as to the truth of the
4 allegations contained in paragraph 37 of the Complaint.

5 38. Denies knowledge and information sufficient to form a belief as to the truth of the
6 allegations contained in paragraph 38 of the Complaint.

7 39. Denies knowledge and information sufficient to form a belief as to the truth of the
8 allegations contained in paragraph 39 of the Complaint, except admits that after May 8, 2013, the
9 parties and their counsel exchanged correspondence, and refers the court to said correspondence
10 as the best evidence of the statements and other information contained therein.
11

12 40. Denies the truth of the allegations contained in paragraph 40 of the Complaint.

13 41. Denies the truth of the allegations contained in paragraph 41 of the Complaint.

14 42. Denies the truth of the allegations contained in paragraph 42 of the Complaint.

15 43. Denies the truth of the allegations contained in paragraph 43 of the Complaint.
16

17 **COUNT I**
18 **(COPYRIGHT INFRINGEMENT, 17 U.S.C. § 101 ET SEQ.)**

19 44. Defendant repeats and re-alleges each and every allegations set forth in paragraph 1
20 through 43 above.

21 45. Denies the truth of the allegations contained in paragraph 45 of the Complaint.

22 46. Denies the truth of the allegations contained in paragraph 46 of the Complaint.

23 47. Denies the truth of the allegations contained in paragraph 47 of the Complaint.

24 48. Denies the truth of the allegations contained in paragraph 48 of the Complaint.

25 49. Denies the truth of the allegations contained in paragraph 49 of the Complaint.

26 50. Denies the truth of the allegations contained in paragraph 50 of the Complaint.

1 51. Denies the truth of the allegations contained in paragraph 51 of the Complaint.

2 52. Denies the truth of the allegations contained in paragraph 52 of the Complaint.

3 53. Denies the truth of the allegations contained in paragraph 53 of the Complaint.

4 54. Denies the truth of the allegations contained in paragraph 54 of the Complaint.

5 **COUNT II**
6 **(FALSE DESIGNATION OF ORIGIN, 15 U.S.C. § 1125(A))**

7 55. Defendant repeats and re-alleges each and every allegations set forth in paragraph 1
8 through 54 above.

9 56. Denies the truth of the allegations contained in paragraph 56 of the Complaint.

10 57. Denies the truth of the allegations contained in paragraph 57 of the Complaint.

11 58. Denies the truth of the allegations contained in paragraph 58 of the Complaint.

12 59. Denies the truth of the allegations contained in paragraph 59 of the Complaint.

13 60. Denies the truth of the allegations contained in paragraph 60 of the Complaint.

14 61. Denies the truth of the allegations contained in paragraph 61 of the Complaint.

15 62. Denies the truth of the allegations contained in paragraph 62 of the Complaint.

16 **JURY DEMAND**

17 Defendant hereby demands a trial by jury on all issues triable of right by a jury.

18 **AFFIRMATIVE DEFENSES**

19 Defendant hereby sets forth his separate and distinct affirmative defenses to the claims set
20 forth in Plaintiffs' Complaint. By listing any matter as an affirmative defense, Defendant does
21 not assume the burden of proving any matter upon which Plaintiff bears the burden of proof
22 under applicable law.

23 **FIRST AFFIRMATIVE DEFENSE**

24 Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the doctrine of fair use.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part, as any use proven by Plaintiff is transformative and as such is fair use.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, are limited by Defendant's innocent intent.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the doctrine of waiver and/or abandonment.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part because Plaintiff has failed to mitigate its damages.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the fact Plaintiff does not own a valid copyright in one or more of the works it seeks to recover damages for.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's damages if any are limited on the grounds that a statutory damage award would be wholly disproportionate to any alleged amount of actual harm to Plaintiff and as such would be punitive and unconstitutional.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by 17 U.S.C. 113.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the common law doctrine of exhaustion and/or principles of exhaustion.

THIRTEENTH AFFIRMATIVE DEFENSE

To the extent Plaintiff seeks attorneys fees or statutory damages in this action, such remedies are not available pursuant to *inter alia*, 17 U.S.C. § 412.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the Court's lack of personal jurisdiction over Defendant.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part based upon the doctrine of substantial-non infringing use.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, precluded and/or limited, in whole or in part by the doctrine of laches.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the statute of limitations.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff lacks standing to assert its Complaint and the claims pled therein.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the doctrine of preemption.

TWENTIETH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Plaintiff's claims are barred in whole or in part because some or all of the allegedly infringed works have not been registered in accordance with the Copyright Act.

TWENTY-FIRST AFFIRMATIVE DEFENSE

The Plaintiff's alleged copyrights consist of translations and/or other material that is neither original to Plaintiff nor protectable copyrightable subject matter.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Upon information and belief, Plaintiff's claims are barred in whole or in part, as it does not own a valid registration in the alleged works that are asserted in the instant Complaint.

Upon information and belief, Plaintiff has committed a fraud on the Copyright Office.

Plaintiff represented to the Register of Copyrights in its applications for the registrations at issue that it is the owner of certain rights in and to the works at issue by virtue of work for hire, authorship and/or by written agreement.

Upon information and belief, Plaintiff's above statements to the copyright office were knowingly false when made.

Upon information and belief, Plaintiff neither owns nor has the exclusive rights to either the 2-D artwork, or the text on the Pokémon cards which are the claimed subject matter in the Certificates of Registration upon which Plaintiff's claims are based.

1 Upon information and belief, in reliance upon Plaintiff's factual representations that it was
2 the owner of certain rights in and to the Pokémon cards by virtue of work for hire, authorship
3 and/or by written agreement, the Register of Copyrights issued Certificates of Registration for
4 the elements of the Pokémon cards that were claimed by Plaintiff.

5 Upon information and belief, Plaintiff misrepresented ownership and/or claimed rights in and
6 to the Pokémon cards. Upon information and belief, Plaintiff obtained the Certificates of
7 Registration for the works at issue in this action by false means and/or knowingly making false
8 and/or fraudulent declarations and/or representations to the Register of Copyrights, with an intent
9 to deceive the Register of Copyrights. Upon information and belief, Plaintiff knew at the time
10 of filing the applications for registration that the statements and representations regarding alleged
11 ownership of the works was false.

13 Upon information and belief, the inaccuracy of the information Plaintiff provided to the
14 Register of Copyrights, if known would have caused the Register of Copyrights to refuse
15 registration.

17 Defendant has been damaged by Plaintiff's above acts as Plaintiff is being allowed to assert
18 the instant claims against him, when upon information and belief, Plaintiff is not the owner of the
19 copyrights at issue, obtained the Certificates of Registration upon which this action is based by
20 fraud, and lacks the standing to sue, and should not be allowed to maintain the instant claim.

21 As such, Plaintiff's claims are barred in whole or in part by fraud upon the Copyright Office.

22 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

23 Plaintiff's claims are barred in whole or in part by the Court's lack of jurisdiction over the
24 subject matter of this action, due to Plaintiff's failure to comply with 17 U.S.C. § 411(a),
25 specifically that Plaintiff does not have a registration for all of the works at issue, that Plaintiff is
26

1 not the author or exclusive licensee of the works at issue and/or that the claimed translations and
2 other text are not original copyrightable subject matter.

3 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

4 Plaintiff's claims are barred in whole or in part, by copyright misuse as Plaintiff has
5 consistently, and is unfairly claiming rights broader than those granted by the copyrights at issue.
6 Specifically, as set forth above, upon information and belief Plaintiff is not the owner or the
7 exclusive licensee of the 2-D artwork and/or text that Plaintiff claims ownership of.
8 Additionally, Plaintiff is asserting copyright infringement over works and/or parts of works not
9 subject to any existing copyright registrations, including but not limited some of the 2-D artwork
10 on the Pokémon cards at issue in this litigation.
11

12 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

13 Plaintiff's claims are barred in whole or in part, on the grounds that they constitute a restraint
14 of trade and/or are contrary to public policy.
15

16 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

17 Improper venue.

18 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

19 Plaintiff's claims are barred in whole or in part, due to its failure to join an indispensable
20 party.
21

22 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

23 Plaintiff's claims are barred in whole or in part, based on the doctrine of abandonment of
24 copyright.
25
26

TWENTY NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part, on the grounds that Plaintiff is at best a mere licensee of the trademarks at issue and as such any alleged use inures to the benefit of the licensor such that Plaintiff has no rights and to title acquired by use.

THIRTIETH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part, based upon the doctrine of abandonment, as the marks at issue have been licensed without quality control, and any alleged rights in or to the marks should be deemed abandoned.

THIRTY FIRST AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part, due to Plaintiff's and/or the mark owner's failure to police its mark. As such the alleged marks have been weakened by widespread use by other(s).

THIRTY SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part, as Plaintiff does not own a valid trademark or own trademark rights in and to the marks it has asserted in the Complaint.

THIRTY THIRD AFFIRMATIVE DEFENSE

There is no and was no likelihood of confusion between the Pokellektor App and Website on the one hand and any of Plaintiff's products on the other hand, nor are consumers likely to believe there is any association, or sponsorship between the parties.

WHEREFORE, Defendant demands judgment as follows:

- a) that Plaintiff's Complaint be dismissed in its entirety with prejudice;
- b) that Defendant be awarded costs, including reasonable attorneys' fees from Plaintiff pursuant *inter alia* to 17 U.S.C. §505; and

1 c) that this Court award Defendant such other and further relief as the Court deems
2 just and proper.

3 DATED this 19th day of December, 2014.

4
5 STOKES LAWRENCE, P.S.

6
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26 Attorneys for Defendant Marcus Frasier

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014, I caused the foregoing *Answer and Affirmative Defenses* to be:

☒ electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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